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# Crazy Reasons

STEPHEN J. MORSE\*

If a businessperson makes a bad deal because she is inattentive to crucial information, the contract will be enforced; if she is inattentive because she is crazy, she may be able to avoid the contract. An ex-con with three priors for aggravated assault who threatens to do it again cannot be incarcerated unless she gets close enough to completion to qualify for criminal attempt liability; if she threatens to commit the same crime because she is crazy, she may be involuntarily civilly committed. Why does the law provide for such differential treatment?

This article pursues and updates arguments I made two decades ago about why the law treats some people with mental disorder specially and how such laws should be formulated and adjudicated.<sup>1</sup> Although I still reach most of the same conclusions, the nature of the argument has changed. The Article begins by addressing the law's view of the person and then turns to the theory of responsibility that flows from that view. The account will be positive and internal. That is, it accepts the general validity of the current legal regime and tries to offer the best explanation of it. Next, it considers the general criteria for responsibility and excuse. I suggest that the general capacity to grasp and be guided by reason and lack of coercion are the criteria for responsibility that both morality and the law adopt. Correlatively, the lack of such general capacity for reason and being confronted with a sufficiently coercive hard choice are the genuine excusing conditions. This section concludes by suggesting that many of the usual explanations for nonresponsibility or excuse are

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1. Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978).

wrong, misleading, or confused. In particular, it explains why causation, including abnormal biological causes, do not per se imply incompetence or nonresponsibility.

The article then turns to the relation of mental abnormality to the theory of responsibility and to why the law treats some crazy people differently from mentally normal citizens. The thesis is that all the various legal criteria for incompetence, nonresponsibility and the like are simply ways of asking whether the agent acted for crazy reasons and consequently was generally incapable of being guided by good reason in the operative context. The argument is both positive and normative: it explains current mental health laws and practice and it furnishes a framework for both celebration and criticism. Finally, the Article considers what data legal decision makers need to adjudicate mental health law cases and what role mental health professionals should play in providing such data.

## I. THE LAW'S VIEW OF THE PERSON AND RESPONSIBILITY

Intentional human conduct, that is, *action*, unlike other phenomena, can be explained by physical causes *and* by reasons for action. Although physical causes explain the movements of galaxies and planets, molecules, infrahuman species, and all the other moving parts of the physical universe, only human action can also be explained by reasons. It makes no sense to ask a bull that gores a matador, "Why did you do that?," but this question makes sense and is vitally important when it is addressed to a person who sticks a knife into the chest of another human being. It makes a great difference to us if the knife-wielder is a surgeon who is cutting with the patient's consent or a person who is enraged at the victim and intends to kill him.

When one asks about human action, "Why did she do that?," two distinct types of answers may therefore be given. The reason-giving explanation accounts for human behavior as a product of intentions that arise from the desires and beliefs of the agent. The second type of explanation treats human behavior as simply one more bit of the phenomena of the universe, subject to the same natural, physical laws that explain all phenomena. Suppose, for example, we wish to explain why Molly became a mental health lawyer and advocate for consumers' rights. The reason-giving explanation might be that she wishes to emulate her admired mother, a committed attorney and advocate, and Molly believes that the best way to do so is also to become a lawyer. If we want to account for why Molly chose one law school rather than another, a perfectly satisfactory explanation under the circumstances

would be that Molly knew that the chosen school was the best that admitted her and had a strong mental health law curriculum. Philosophers refer to this mode of reason-giving explanation as “folk psychology.”

The mechanistic type of explanation would approach these questions quite differently. For example, those who believe that the mind can ultimately be reduced to the biophysical workings of the brain and nervous system—eliminative materialists—also believe that Molly’s “decision” is *solely* the law-governed product of biophysical causes. Her desires, beliefs, intentions, and choices are therefore simply epiphenomenal, rather than genuine causes of her behavior. According to this mode of explanation, Molly’s “choices” to go to law school and to become an attorney and all other human behavior are indistinguishable from any other phenomena in the universe, including the movements of molecules and bacteria.

The social sciences, including psychology and psychiatry, are uncomfortably wedged between the reason-giving and the mechanistic accounts of human behavior. Sometimes they treat behavior “objectively,” treating it as primarily mechanistic or physical; other times, social science treats behavior “subjectively,” as a text to be interpreted. Yet other times, social science engages in an uneasy amalgam of the two. What is always clear, however, is that the domain of the social sciences is human *action* and not simply the movements of bodies in space. One can attempt to assimilate folk psychology’s reason-giving to mechanistic explanation by claiming that desires, beliefs and intentions are genuine causes, and not simply rationalizations of behavior. Indeed, folk psychology proceeds on the assumption that reasons for action are genuinely causal. But the assimilationist position is philosophically controversial, a controversy that will not be solved until the mind-body problem is “solved”—an event unlikely to occur in the foreseeable future.

Law, unlike mechanistic explanation or the conflicted stance of the social sciences, views human action as almost entirely reason-governed. Law conceives of the person as a practical reasoning, rule-following being, most of whose legally relevant movements must be understood in terms of beliefs, desires, and intentions. As a system of rules to guide and govern *human* interaction—the legislatures and courts do not decide what rules inhuman species must follow—the law presupposes that people use legal rules as premises in the practical syllogisms that guide much human action. No “instinct” governs how fast a person drives on

the open highway. But among the various explanatory variables, the posted speed limit and the belief in the probability of paying the consequences for exceeding it surely play a large role in the driver's choice of speed. For the law, then, a person is a practical reasoner. The legal view of the person is not that all people always reason and behave consistently rationally according to some pre-ordained, normative notion of rationality. It is simply that people are creatures who act for and consistently with their reasons for action and who are generally capable of minimal rationality according to mostly conventional, socially constructed standards.

The law's concept of responsibility follows logically from its conception of the person and the nature of law itself. As a system of rules that guides and governs human interaction, law tells citizens what they may and may not do, what they must or must not do, what abilities are required competently to perform certain tasks, and what consequences will follow from their conduct. Unless human beings were rational creatures who could understand the good reasons for action, including the relevant facts and rules, and could conform to legal requirements through intentional action, the law would be powerless to affect human action. Legally responsible agents are therefore people who have the general capacity to grasp and be guided by good reason in particular legal contexts. For example, they must be generally capable of properly using the rules as premises in practical reasoning. Legally responsible agents are capable of rational practical reasoning and the law's usual presumptions are that adults are so capable and that the same rules may be applied to all.

The general capacity for rationality is not self-defining. It must be understood according to some contingent, normative notion both of rationality and of how much capability is required. For example, legal responsibility might require the capability of understanding the reason for an applicable rule, as well as the rule's narrow behavior command. These are matters of moral, political and, ultimately, legal judgment, about which reasonable people can and do differ. I offer in the next section<sup>2</sup> an interpretation of the law's rationality requirement, but there is no uncontroversial definition of rationality or of what kind and how much is required for responsibility in various legal contexts. These are normative issues and, whatever the outcome might be within a polity and its legal system, the debate is about human action—intentional behavior guided by reasons.

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2. See *infra* Section IIA.

## II. THE CRITERIA FOR RESPONSIBILITY AND EXCUSE

Mental health laws treat some crazy people specially and all such laws include two elements. First, the potential subject must engage in actual or potential legally relevant behavior, such as incompetent performance of some task or dangerous conduct. An agent who is simply crazy but who does not otherwise engage in behavior that concerns the law will not be the subject of special mental health law treatment. Second, the legally relevant behavior must be the result of mental disorder. For example, a criminal defendant's irrationality must be symptomatic of disorder. The potential civil committee's potential reason for dangerous behavior must be crazy. The second requirement is crucial because it is the doctrinal expression of the nonresponsibility assumption that permits some crazy people to be treated specially. In other words, special legal treatment is warranted if a crazy person was or is not responsible for legally relevant conduct. In such cases, the usual presumptions in favor of liberty and autonomy are suspended because responsible agency based on the capacity for rationality is the premise for these presumptions. To support this claim requires that we have in place a robust, general theory of normative competence and nonresponsibility. I argue that the law and morality include two generic nonresponsibility conditions: nonresponsible irrationality (or normative incompetence) and nonresponsible hard choice. An agent who is nonresponsibly irrational or faces a sufficiently hard choice when she acts or will act is not responsible for the conduct motivated by irrationality or coercive hard choices. This section first discusses these two excusing conditions and then turns to exploration of common false, misleading, and confusing explanations for excuse.

### A. Rationality

The general capacity for rationality or normative competence is the most general, important prerequisite to being a responsible agent.<sup>3</sup>

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3. I state this criterion in alternative terms—rationality or normative competence—because the concept of rationality is associated with so much historical, conceptual and philosophical disagreement that the term distracts many people. As I explain *infra*, pp. 199-202. I mean nothing exalted or essential by the term. It is simply a common sense term used to cover a congeries of human capacities without which morality and human flourishing in general would be difficult. If the term seems too

Indeed, the lack of this general capacity explains virtually all cases in which morality and the law fully or partially excuse conduct, and it explains in general the law's special treatment of certain classes of people, such as children and some crazy people. More specifically, for morality and the law, rationality or normative competence means that the agent has the general capacity to understand and to be guided by the good reasons that apply in the relevant legal or moral context. The agent can be incapable of rationality, cannot be guided by good reason, in three different respects: first, the agent is unable rationally to comprehend the relevant facts; second, the agent is unable rationally to comprehend the applicable moral or legal rules or expectations; and third, the agent is unable rationally to assess the import of the facts or rules. Although distinguishable, all three could be collapsed into the general notion that the agent is unable rationally to understand what she was doing when she acted.<sup>4</sup>

Let us consider some examples. If a businessperson makes an extravagantly bad deal, she must suffer the consequences because the law assumes that adults are capable of understanding the nature of the deal, even though on the present occasion the feckless contractor might have been scandalously careless about her own best interest. But if the reason that the businessperson was unaware of the nature of the deal was that the agent was *incapable* of rational understanding, then the agent will be allowed to avoid the deal. The virtues and consequences of a regime of free contracting would be undermined if agents incapable of rationality were held to their bargains.

For another example, just criminal blame and punishment require that those who violate the criminal law must be capable of rationally understanding their harmful conduct and its consequences. Effective criminal law requires that citizens must understand in general terms what conduct is prohibited, the nature of their conduct, and the consequences for doing what the law prohibits. Homicide laws, for example, require that citizens understand that intentionally killing other human beings is prohibited in most circumstances, what counts as killing conduct, and that the state will inflict pain if the rule is violated. A person incapable of understanding the rule or the nature of her own conduct, including the context in which it is embedded, could not properly use the rule to guide her conduct.

To take a specific example, a person who delusionally believed that

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broad, I am perfectly comfortable with the term, "normative competence."

4. The *M'Naghten* test for legal insanity distinguishes the first two. *M'Naghten's Case*, 10 Clark & Finnelly, 8 Eng. Rep. 718 (1843). The first prong of the Model Penal Code test collapses the first two rationality defects.



she was about to be killed by another person and kills the other in the mistaken belief that she must do so to save her own life, does not rationally understand what she is doing. She of course knows that she is killing a human being and does so intentionally. And, although in the abstract she probably knows and endorses the moral and legal prohibition against *unjustified* killing, in this case the rule against unjustifiable homicide will be ineffective because she is incapable of rationally understanding that her action is not justifiable. It would be unfair to blame and punish the delusional agent because she is not a morally responsible agent. She is unable rationally to comprehend the most morally relevant fact bearing on her culpability—whether her life is genuinely threatened.

The general incapacity for rationality is what distinguishes the mentally disordered agent from people who are ignorant, mistaken, careless or the like, but who have the general ability rationally to understand and to satisfy social, moral, and legal rules and expectations. If people with this capacity fail because they behave irrationally, we believe they are responsible for their failure because they were capable of succeeding. In contrast, we believe that the disordered agent's irrationality is not her fault because she lacked the general capacity for rationality. The delusional person is faultless for failing to recognize that her life is not imperilled; the careless person who makes the same, unreasonable mistake about the impending threat of deadly harm is at fault.

I have claimed that the *general* capacity for rationality is the primary criterion of responsibility and that its lack is the primary excusing condition. A general capacity is nothing more than an underlying ability to engage in certain behavior.<sup>5</sup> English speakers, for example, have the general capacity to speak English, even when they are silent or are speaking a different language. Of course, the general capacity can refer to behavior that may be a continuum. For example, a person of average strength might be able easily to lift a certain amount of weight. As the weight increased, it would become harder for the person and would finally become impossible. As long as the agent is generally capable of certain conduct, it is fair to hold the agent responsible for failing to engage in such conduct if there is reason for the agent to do so. For example, suppose an object fell on and pinned down a victim that the

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5. For more detail, see R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 214-21 (1994).



agent had a duty to aid. If the object were light, the average agent might have no difficulty removing it; if it were heavy, removing it would be more difficult, but morality and the law alike would expect the agent to strain to do so and would blame an agent who did not exercise a capacity she possessed. People often engage in legally relevant behavior for non-rational, irrational, and foolish reasons, but this does not excuse them or render them nonresponsible if they are generally capable of rationality.

There are objections to the notion of a general capacity. Some might contend that it is impossible for an agent to exercise a general capacity on a specific occasion when the agent did not exercise it. Such an argument is simply a form of the *reductio* that no one is capable of doing anything other than what they did do. This is trivially true in the sense that agents cannot do “p” and “not-p” at the same time. It does not follow, however, that it is impossible for an agent to exercise the general capacity. An English speaker who is silent surely has the general capacity to speak English. A more challenging version of the same claim is the argument from determinism, which would suggest that the notion of a general capacity is useless because at a fixed time only one outcome is ever possible for both people and the other moving parts of the universe, given antecedent events and the fixed laws of the physical world. Such an argument is an external, metaphysical attack on the basic concepts and practices of responsibility. Taken seriously, it would suggest that no one should ever be treated as more or less responsible than anyone else because no one or everyone is responsible. Thus, this argument cannot possibly explain or furnish internal grounds for criticism of current concepts and practices.<sup>6</sup> The notion of a general capacity is one we use all the time to evaluate the behavior of ourselves and others and there is no reason to abandon it in the face of an unresolvable metaphysical challenge.

Rationality is of course a continuum concept and individuals differ widely in their ability to get the facts straight, to understand the rules, to reason, and the like. People with fewer endowments will find it harder to be rational; people with more will find it easier. In general, however, the threshold for responsibility or competence in law is not high. Quite minimal rationality will usually suffice and unimpaired adults will have the general capacity in most contexts to meet the law’s relatively modest requirements.

What is the content of rationality that responsibility requires? As part of the normative, socially constructed practice of ascribing responsibility, there cannot be an *a priori*, uncontroversial answer. A

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6. This point is discussed further *infra* Section II.C.

normative, moral and political judgment concerning the content and degree of rationality is necessary. Nonetheless, some guidance is possible. I do not have an exalted or complicated notion of rationality, which is in fact a congeries of skills, rather than a unitary capacity. At the very least, it must include the ability, in Susan Wolf's words, "to be sensitive and responsive to relevant changes in one's situation and environment—that is, to be flexible."<sup>7</sup> On this account, rationality is the ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference-ordering. Rationality includes the general ability to recognize and be responsive to the good reasons that should guide action.<sup>8</sup> Put yet another way, it is the ability to act for good reasons and it is always a good reason not to act (or to act) if doing so (or not doing so) will be harmful or maladaptive. Notice that it is not necessary for full responsibility that an agent acts for good, generalizable reason at the operative time. The general normative capacity to be able to grasp and be guided by reason is sufficient.

After much thought, I have come to the conclusion that normative competence for criminal responsibility should require the ability to empathize and to feel guilt or some other reflexive reactive emotion. Unless an agent is able to put herself affectively in another's shoes, to have a sense of what a potential victim will feel as a result of the agent's conduct, and is able at least to feel the anticipation of unpleasant guilt for breach, that agent will lack the capacity to grasp and be guided by the primary rational reasons for complying with moral expectations. What could be a better reason not to breach a moral expectation than a full, emotional understanding of the harm one will cause another? People who lack such understanding are, in my opinion, "morally irrational" and it is moral responsibility that is in issue.

A highly controversial question is whether desires or preferences in themselves can be irrational.<sup>9</sup> It is of course true that having desires most people consider irrational is likely to get someone into trouble, especially if the desires and situations that tempt an agent are strong. Nonetheless, I conclude that even if desires can be construed as irrational, irrational desires do not deprive the agent of normative

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7. SUSAN WOLF, *FREEDOM WITHIN REASON* 69 (1990).

8. See JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* 41 (1998).

9. ROBERT NOZICK, *THE NATURE OF RATIONALITY* 139-40 (1993) ("At present, we have no adequate theory of the substantive rationality of goals and desires. . . .").

competence unless they somehow disable the rational capacities just addressed or they produce an internal hard choice situation distinguishable from the choices experienced by people with equally strong, rational desires. In other words, if the agent with irrational desires can comprehend the relevant features of her conduct, she can be held responsible if her irrational desires are the reasons she engages in legally relevant behavior.

Because I claim that irrationality or normative incompetence best explains why we excuse and is the primary excusing condition, the concept of irrationality must do a great deal of work in the account presented. One might therefore desire a more precise, uncontroversial definition of irrationality, but such a desire would be unreasonable. The definition I am using, which is always open to normative revision, is grounded in our ordinary, everyday understanding of practical reasoning and its critical role in human interaction, including morality. We are, after all, the only creatures on earth—and I don't "do" elsewhere—who truly act for reasons. We all everywhere and always successfully employ the imprecise definition I am using to evaluate the moral and nonmoral conduct of ourselves and others. To require more is to require the impossible and the unnecessary. Moreover, if one wishes to abandon irrationality as the core excusing condition, the burden is then on the agent rejecting irrationality to offer and justify a more morally compelling and precise alternative. As we shall see in Section II.C.,<sup>10</sup> most of the alternatives offered do not and cannot explain the excuses we have and would be unworkable.

## B. "*Hard Choice*"

In addition to irrationality, a wrongfully-imposed hard choice is also an excusing or nonresponsibility condition. Some would term the condition, "compulsion," but the true basis of excuse is hard choice. In brief, the law excuses if an agent is coerced to engage in legally relevant conduct. For example, the criminal law's doctrine of duress excuses a criminal wrongdoer if the agent is threatened with death or grievous bodily harm against the defendant or another and a person of reasonable firmness would have been "unable to resist."<sup>11</sup> Similarly, an agent coerced to contract will be able to avoid that contract. In other words, an agent faced with a particularly "hard choice"—say, commit a crime or be killed or grievously injured—is excused if the choice was too hard to

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10. See *infra* p. 203-09.

11. See MODEL PENAL CODE § 2.09 (1985).

require the agent to resist.<sup>12</sup> We think that it is unfair to hold the agent responsible for her legally relevant conduct because resisting the coercion was too hard under the circumstances.

Coercion is not based on empirical assumptions about the specific capacities of individual agents to resist coercive conditions. It is a normative, moralized standard. The best interpretation of objective standards for coercion, such as the "person of reasonable firmness," is that they ask when a choice was too hard to require the agent to resist or face negative legal consequences for yielding. If, objectively, a person of reasonable firmness or the equivalent would resist, the choice is not too hard and the agent will be held responsible for the conduct in question.

The "person of reasonable firmness" standard does *not* mean that everyone who is not dispositionally of reasonable firmness will be excused. The defense is not available to a defendant allegedly "unable" to resist if a person of reasonable firmness would have been able to resist. Those who are fortunate enough to be especially brave and those who are of average braveness will be able to meet it quite readily. Those who are of less than average dispositional firmness will have more

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12. *See id.* The law requires that the threat be made by a human being, but why should it matter if the threat is made by another person or arises as a result of naturally occurring, impersonal circumstances? Imagine the following scenarios, which I borrow from a leading criminal law casebook. In the first, a driver is negotiating a steep, narrow mountain road, with great precipices on both sides. A gunslinger is holding a gun to the driver's head, urging her on. As they come around the curve, two people loom ahead, lying unconscious in the middle of the road. There is no way to go around them. The gunslinger orders the driver at pain of death to drive over the people, which will surely kill them. If the driver accedes, she has the possibility of succeeding with the hard choice excuse of duress in jurisdictions that allow the excuse in cases involving the taking of innocent life. Now consider the same scenario, except that there is no gunslinger. Instead, the driver's brakes fail, despite her completely conscientious maintenance of the vehicle. Either she must drive over the people, surely killing them, or to avoid them, she must go over the side of the precipice and fall to a certain death herself. If an excuse is possible in the first case, it ought to be available in the second. Moreover, why should a threat of death or grievous bodily harm be necessary, as the law now requires? People of reasonable firmness are more likely to find such threats too hard to bear, compared to threats of lesser physical or psychological harms, but why exclude the latter a priori? Consider a person who possesses a financially worthless object—say, a cheap memento from a beloved, deceased parent—that is of supreme psychological importance to the person. Now, a desperado threatens to destroy the memento unless the agent destroys more valuable property or inflicts some form of physical harm on another. It is at least morally thinkable that, depending on the degree of the other harm, a rational person of reasonable firmness might yield.

trouble resisting when they should. Still, if we judge that the person had the general capacity to comply with the reasonable firmness standard, then she will be held responsible for yielding when she should not, even if it is harder for her to resist than for most. Similarly, if the conditions under which an agent contracted were objectively non-coercive, the agent will be held to the bargain, even if she subjectively felt entirely coerced and contracted only because she felt this way.

Objective legal standards always impose differential costs on agents, depending on the agents' endowments. People with less than average ability to meet them are still held to these standards if they are generally capable of meeting them. This legal result comports with common sense and ordinary morality. When important expectations are involved—for example, be careful; keep your promises; don't harm others—we believe it is fair to expect fellow citizens capable of meeting reasonable standards to comply.<sup>13</sup>

Although in clear cases a coercion excuse seems morally and legally unproblematic, why a hard choice excuses or renders an agent nonresponsible is open to various interpretations. Assuming that coercion should excuse an agent from responsibility, two theories for why it excuses are possible. The first is that the agent is somehow incapacitated or disabled by the coercive circumstances. The second is that the agent's opportunity to act has been unfairly constrained, that is, the agent is a wronged victim. I believe that the latter is the most convincing account,<sup>14</sup> and as I argue below, the former tends to collapse into an irrationality claim.<sup>15</sup> The coerced agent acts intentionally and entirely understandably to save herself from the coercive threat. Her will, understood as a functional executory state, operates effectively to translate her desire to avoid the feared harm into the action necessary to achieve this end.<sup>16</sup> There is no "volitional" problem. If the threatening circumstances so overwhelm the agent or produce such anxiety that the

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13. See H.L.A. HART, *Negligence, Mens Rea, and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 137, 152-54 (1968).

14. I here ally myself with various leading duress theorists. See, e.g., Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989); Herbert Fingarette, *Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape*, 42 WASH. & LEE L. REV. 65 (1985).

15. See *infra* pp. 203-05, 215-17.

16. See HERBERT FINGARETTE & ANNE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 61 (1979). See also *infra* section II.C, for a discussion of the concept of the will or volition. See generally MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 113-65 (1993) (presenting a complete theory of volition and criticizing alternative accounts).

agent cannot be guided by reason, then irrationality will excuse and there is no need for an independent coercion excuse. Indeed, if the defendant is subjectively cool and fearless but the circumstances are sufficiently objectively coercive, she will nonetheless be excused if she yields. Coercion excuses the agent, I claim, because in sufficiently threatening circumstances it is simply unfair to require the agent to resist. The wrongfully-imposed choice is too hard to justify holding an agent responsible if she yields.

Agents who appear to be incapable of reasonable firmness present an apparently problematic case for the hard choice nonresponsibility condition. Either moralized interpretation of coercion appears to risk unfairness in some cases in which yielding is not excused because a person of reasonable firmness would have resisted. Suppose a person appears genuinely unable to resist under such conditions or at least finds it supremely hard to resist. Consider a coward who is threatened with a hard punch unless she kills someone. Or consider a person with a morbid fear of being touched by another who is threatened with a light touch. Although virtually everyone, including cowardly types, would choose to be the victim of a punch or a touch rather than to kill, some people might find the threat of a punch or even a light touch as terrifying and coercive as a death threat. Assuming that some agents genuinely do find it supremely hard to resist lesser threats, how should morality and the law respond in such cases?

On a non-consequential, desert-based theory of justice, holding people responsible under such circumstances would appear to be unjust because a person does not deserve to be held accountable for conduct that is impossible or unduly difficult to avoid. A purely consequential view might justify responsibility to encourage resistance among the marginal people who are capable of resisting, but only at the cost of injustice to those who find it sufficiently difficult to resist.

How should cases of "subjective" hard choice be analyzed? Justice seems to demand nonresponsibility in such cases, but on what theory? One possible answer is that the person's general capacity for rationality is disabled. For example, the fear of bodily injury may be so morbid that any threat creates anxiety sufficient to block the person's capacity to grasp and be guided by good reason. In such cases, standard irrationality claims will be sufficient and there will be no need to employ an independent coercion or hard choice claim.

An alternative way of analyzing the "subjective" hard choice case that perhaps has special relevance to mental health law is as an example of



what I term “internal hard choice.” In such cases, the coercive circumstance that creates the hard choice is not an external, objectively threatening circumstance; instead it is the threat of such supremely dysphoric inner states—psychological pain—that renders the choice so hard for this agent.<sup>17</sup> A model of hard choice created by the threat of internal dysphoria may be the best explanation of why we believe agents are not responsible in an array of cases that are often thought to require a “volitional” or control excuse, such as the pedophile, pyromaniac, compulsive gambler, drug “addict,” and similar cases. In all, the predisposition causes intense desires, the frustration of which threatens the agent with great dysphoria. Perhaps a person of reasonable firmness faced with sufficient dysphoria would yield. If so, perhaps the coward or other “subjective” cases should not be held responsible in the absence of irrationality because they satisfy a properly expansive hard choice nonresponsibility condition.

Although the internal hard choice model is plausible and competing explanations that rely on so-called volitional problems are confused or lack empirical support,<sup>18</sup> I prefer to analyze these cases in terms of irrationality. First, at the most practical level, it will often be too difficult to assess the degree of threatened dysphoria that creates the hard choice.<sup>19</sup> Second, it is simply not clear that the fear of dysphoria would ever produce a choice sufficiently hard to excuse an agent from the legal consequences of her action, except in precisely those cases in which we would assume naturally that the agent’s rational capacity was essentially disabled. Death and grievous bodily harm are dreadful consequences for virtually any rational person. Other threatened consequences, such as lesser physical, emotional or economic harms, may also be extremely unpleasant and subjectively feared, but threat of such lesser harms will not warrant a hard choice excuse. For example, committing crimes is itself considered so wrong that we require people to buck up and obey the law, even if they are very fearful.

Dysphoric mental or emotional states are surely undesirable, but does their threat produce a sufficiently hard choice to warrant nonresponsibility? I do not know the answer to this question, but perhaps at the extreme they do. People suffering from severe depressive disorders, for example, report subjective pain that is as great and enduring as many forms of grievous bodily harm, and sometimes they kill themselves to avoid the psychological pain. But people don’t

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17. I have explored such a model for inner coercion at length elsewhere. See Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1619-34 (1994).

18. See *id.* at 1658-59.

19. See *infra* Section IV.B.

consciously engage in legally relevant behavior to ward off the feared onslaught of severe depression. And people suffering from such severe depression are undeniably irrational. Simply put, it seems unlikely that most rational agents threatened with dysphoria face a sufficiently hard choice to warrant nonresponsibility.

Consider for comparison the feared dysphoria of addicts: Is it as severe as the fear of major depression? Again, I don't know the answer, but the physical symptoms of withdrawal from most drugs, for example, are simply not terribly severe—withdrawal from heroin is often likened to a bad flu—and withdrawal can be medically managed to reduce the discomfort.<sup>20</sup> Consequently, fear of the physical symptoms hardly seems to rise to the category of fear of death or grievous bodily harm, and medical management is a reasonable alternative to crime for some compulsions. I suspect that the feared dysphoria of unconsummated compulsive cravings is not as severe as the fear of death or grievous bodily harm. If I am correct, few sufferers from internal coercion would succeed with a hard choice excuse, albeit we might feel sympathetic towards their plight. In sum, I am claiming that the person who appears genuinely incapable of resisting when the threats are objectively insufficient to excuse—if any there be—will almost certainly be a person with irrational fears or other irrational beliefs that will satisfy the irrationality criteria for nonresponsibility.

C. *False, Confusing and Misleading Explanations: Causation, Biology, Will, Choice, and Control*

People consistently try to explain why some people are not responsible by claiming that nonresponsible agents are subject to determinism, or that their behavior is caused, especially by “abnormal” psychological or biological causes, or that they lack free will, or that they do not choose their behavior, or that they cannot control themselves. In contrast, I argue that most of these explanations are conclusory, false, beg the question, prove too much, or mislead. I have

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20. See JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 35-36 (1983). Withdrawal from severe alcohol dependence can be an exception, but because ethanol is freely and inexpensively available for adults, those who fear withdrawal seldom need to commit crimes or engage in other untoward intentional behavior to obtain ethanol to avoid withdrawal.

given a fuller account elsewhere,<sup>21</sup> so I shall generally summarize the argument here. Because neuroscientific understanding of behavior increases rapidly and the relation between abnormal biological causes and responsibility is considered particularly relevant to mental health law, I give an especially full account of this relation.

Determinism or universal causation cannot be an excusing or nonresponsibility condition. If either is a true description of causation, it applies to all events in the universe. If either were an excusing condition, all behavior would be excused and no one would be responsible. Perhaps this is the way the world “really” is. If so, our practices of holding some people legally responsible and exempting others from responsibility are perhaps morally suspect, but determinism or universal causation cannot be an excusing condition in a world with responsibility. To believe that causation excuses is what I have termed the “fundamental psycholegal error.”<sup>22</sup> Of course, excusing conditions such as irrationality or coercion are themselves caused by something, but they are not excuses because they are caused.

So-called partial or selective causation is an oxymoron that fails to correct the fundamental psycholegal error. Causation is not a matter of degree. If behavior is caused at all—as it surely is—it is fully the product of its jointly sufficient causes. We know more about the causes of some behavioral phenomena than about others, but partial information is different from partial causation. Causation per se is not an excuse and behavior is not excused to the extent it is caused. Responsibility is not inversely proportional to the strength of causation. Children are not excused because their behavior is more caused than the behavior of adults. They are not fully responsible because they are not fully rational.

Even an abnormal cause does not excuse or create nonresponsibility per se, including psychopathology or pathology of the brain and nervous system. When agents behave inexplicably irrationally, we frequently believe that underlying pathology produces the irrationality, but it is the irrationality, not the pathology, that produces nonresponsibility. After all, pathology does not always produce an excusing condition, and when it does not, there is no reason to excuse the resultant conduct. To see why, imagine a case in which pathology is a but-for cause of rational behavior. Consider a person with paranoid fears for her personal safety, who is therefore hypervigilant to cues of impending danger. Suppose on a given occasion she accurately perceives such a cue and kills properly

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21. See Stephen J. Morse, *Deprivation and Desert*, in FROM CRIMINAL JUSTICE TO SOCIAL JUSTICE, (William Heffernan & John Kleinig eds., forthcoming 2000).

22. Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME AND JUSTICE: A REVIEW OF RESEARCH 329, 350 (1998).

to save her life. If she had not been pathologically hypervigilant, she would have missed the cue and been killed. She is perfectly responsible for this rational, justifiable homicide. Or take the case of a hypomanic businessperson, whose manic energy and heightened powers are a but-for cause of making an extremely shrewd deal. Assume that business conditions later change unforeseeably and the deal is now a loser. The deal was surely rational and uncompelled when it was made and no sensible legal system would later void it because the businessperson was incompetent to contract. Even when pathology is uncontroversially a but-for cause of behavior, that conduct will be excused only if an independent excusing condition, such as sufficient irrationality or hard choice, is present. Even a highly abnormal cause will not excuse unless it produces a genuine excusing condition.

In this age of exciting and rapid advances in brain science, the discovery of biological pathology that may be associated with legally relevant behavior lures many people to treat the agent as purely a mechanism and the behavior as simply the movements of a biological organism. Because mechanisms and their movements are not appropriate objects of moral and legal responsibility, the inevitable conclusion seems to be that the agent should not be held legally responsible. Nevertheless, causation is neither an excuse nor does it create nonresponsibility, and even within a more sophisticated theory of nonresponsibility or excuse, brain or nervous system pathology will usually play a limited role in supporting an individual excusing condition.

To begin, biological causation will only be part of the causal determinants of any intentional conduct, which is always mediated by one's culture, language, and the like. The best accounts of the relation between brain and behavior suggest that, no discrete bit of physiology always and everywhere produces exactly the same intentional conduct in all human beings experiencing that physiological state, no stimulus produces exactly the same brain states in all people responding to it, and no bit of exactly the same behavior emitted by different people is attended by exactly the same brain state in all the similarly-behaving agents. For example, the same pathophysiological or psychopathological processes may produce delusional beliefs in all people in whom these processes operate, but the delusional content and resultant behavior of delusional thirteenth-century subcontinental Indians will surely differ from that of delusional late twentieth-century Americans. Biological variables are not the sole determinants of intentional human action.

More fundamentally, biological causation will not excuse per se because people are biological creatures and biology is always part of the causal chain for everything we do. If biological causation excused, no one would be responsible. Intentional human action and neuropathologically-produced human movements are both biologically driven, yet they are conceptually, morally, and legally distinguishable. Moreover, if biology were “all” the explanation and everything else, including causal reasons for action, were simply epiphenomenal, as the eliminative materialists claim, then our entire notions of ourselves and responsibility would surely alter radically. But eliminative materialism is philosophically controversial<sup>23</sup> and science furnishes no reason to believe that it is true. Indeed, it is not clear conceptually that science could demonstrate that it is true. Thus, until the doctor comes and convinces us that our normative belief in human agency and responsibility is itself pathological, biological causation per se does not excuse.

Abnormal biological causation also does not excuse per se. Human action can be rational or irrational, uncoerced or coerced, whether its causes are “normal” or “abnormal.” Whatever the causes of human action may be, they will ultimately be expressed through reasons for action, which are the true objects of responsibility analysis. Suppose, for example, that a confirmed brain lesion, such as a tumor, is a but-for cause of behavior. That is, let us suppose that a particular piece of undesirable behavior would not have occurred if the agent never had the tumor. Make the further, strong assumption that once the tumor is removed, the probability that this agent will behave in the legally relevant manner drops to zero. Although one’s strong intuition may be that this agent is not responsible for the undesirable behavior, the given assumptions do not entail the conclusion that the agent should be excused. The undesirable behavior is human action, not a literally irresistible mechanism, and the causal role of the brain tumor does not necessarily mean that the behavior was irrational or coerced. As Herbert Fingarette and Anne Hasse demonstrated in 1979,<sup>24</sup> that conclusion requires independent analysis of irrationality and coercion, rather than the question-begging answer that diseases excuse.

Moreover, it is a mistake to assume that specific brain pathology inevitably produces highly specific, complex, intentional action. Certain

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23. See Galen Strawson, *Consciousness, Free Will, and The Unimportance of Determinism*, 32 *INQUIRY* 3, 3 (1989) (claiming that reductive physicalism about the mind is “moonshine”); see generally JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* (1992) (providing an extended argument for the irreducible reality of mind).

24. See FINGARETTE & HASSE, *supra* note 16, at 55-65.

areas of the brain do control general functions. For example, Broca's area in the left frontal lobe controls the ability to comprehend and produce appropriate language. A sufficient lesion in this site produces and enables us to predict aphasia. But there is no region or site in the frontal lobes or anywhere else in the brain that controls specific, complex, intentional actions. No lesion enables us to explain causally or to predict an agent's reasons and consequent intentional action in the same direct, precise way that a lesion in Broca's area permits the explanation or prediction of aphasia. Neurological lesions can dissociate bodily movements from apparent intentions, producing automatisms and similar "unconscious" states.<sup>25</sup> But such states rarely produce legally relevant behavior, and when they do, the agent is not considered responsible. In these cases we need not even reach the issue of whether the agent's intentional action is rational, because action itself is lacking.<sup>26</sup> The story relating brain or nervous system pathology to intentional conduct will be far more complicated and far less direct than the already-complicated correspondence between brain lesions and the reduction or loss of general functions.

The effect of brain or other nervous system pathology will affect the agent more generally. Suppose, for example, the tumor in the previous example makes the agent irritable or emotionally labile. Such emotional states surely make it harder for any agent to behave well in the face of variables such as provocation or stress, for example, but *per se* they do not render an agent irrational. Other agents may be equally irritable or labile as the result of environmental variables, such as the loss of sleep and stress associated with, say, taking law exams or trying an important, difficult, lengthy case. But these people would not be excused if they offended while in an uncharacteristic emotional state, unless that state sufficiently deprived them of rationality. People with congenital abnormalities or lifelong character traits that predispose them to undesirable legally relevant behavior would have even less excuse for undesirable behavior because they had the time and experience to learn to deal with those aspects of themselves that made behaving well harder.

Consider the case of Charles Whitman, who killed many victims by shooting passers-by from the top of the tower on the University of Texas

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25. I thank Norman R. Relkin, M.D., Ph.D., for making this point to me particularly clearly.

26. Bodily movements that are unconscious are not voluntary acts. *See, e.g.*, MODEL PENAL CODE § 2.01(2) (1985).



campus. He suffered from a brain tumor, and let us assume that we could demonstrate incontrovertibly that he would not have shot if he had not suffered from the tumor. But whether he is nonetheless responsible depends not on the but-for causation of his homicides, but on his reasons for action. If Whitman believed, for example, that mass murder of innocents would produce eternal peace on earth, then he should be excused, whether the delusional belief was a product of brain pathology, childhood trauma, or whatever. But if Whitman was simply an angry person who believed that life had dealt him a raw deal and that he was going to go out in a blaze of glory that would give his miserable life meaning, then he is unfortunate but responsible, whether his anger and beliefs were a product of the tumor, childhood trauma, an unfortunate character, or whatever.

All human action is, in part, the product of but-for causes over which agents have no control and which they are powerless to change, including their genetic endowments and the nature and context of their childrearing. If people had different genes, different parents, and different cultures, they would be different. Moreover, situational determinants over which agents have no control are but-for causes of much behavior. A victim in the wrong place at the wrong time is as much a but-for cause of the mugging as the mugger's genetics and experiences. If no victim is available, no mugging occurs, whatever the would-be mugger's intentions are. Such considerations are treated by philosophers under the rubric, "moral luck."<sup>27</sup> Our characters, our opportunities, and the outcomes of our actions are in large measure the product of luck, and if luck excused, no one would be responsible. A brain tumor or other neuropathology that enhances the probability of the sufferer engaging in irrationally-motivated, legally relevant behavior is surely an example of bad luck. But unless the agent is in fact irrational or the behavior is coerced, there is no reason to excuse the agent simply because bad luck in the form of biological pathology played a causal role. A cause is only a cause. It is not per se an excuse.

The locutions "free will" or "free choice" are often used as criteria for responsibility and their lack as criteria for excuse. But these are usually just conclusory labels that are placeholders for the genuine responsibility and excusing criteria. There is no uncontroversial philosophical definition of these terms. When employed as the opposites of determinism or universal causation, they are subject to the same problems just explored: Everyone or no one will be responsible. Moreover, excused action is intentional, the product of choice, and there

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27. See generally MORAL LUCK (Daniel Statman ed., 1993) (collecting classic articles addressing the topic).

is nothing wrong with the excused agent's will, properly understood as an executory function that produces actions from desires, beliefs and consequent intentions. Consider, for example, the agent subject to duress who acts wrongly to avert threatened harm. The compelled agent acts intentionally, chooses to act to avoid threatened harm, and quite effectively acts wrongly to achieve this goal. People can behave intentionally and effectively but irrationally and choice can of course be unfairly constrained. If so, it is the agent's irrationality or difficulty of choice that excuses, not the lack of free will or the ability to choose.

Finally, it is sometimes said that lack of control over conduct is the reason we excuse, but this locution obscures more than it clarifies. Determinism or universal causation is not inconsistent with control over one's conduct. If it were, everyone or no one would be responsible, depending on whether determinism or universal causation were true. Thus, understood as the opposite of determinism, control cannot explain the excusing conditions we now have or any coherent system in which some people are excused and most are not. The ability to have control, in the operative sense, has nothing to do with determinism. Sometimes, of course, the agent genuinely has no control over the movements of her body, say because there is neuropathology or force majeure, but these are cases of no action and lack of responsibility is unproblematic. But as we have seen repeatedly, the legally relevant behavior that triggers potential application of a mental health law involves undoubted human action. In such cases, lack of control is a metaphorical or commonsense notion. Of course, if an agent is irrational or coerced, it will be hard to do the right thing, but then irrationality or coercion is doing the genuine excusing work. Lack of control is the result, not the cause, of the excusing condition.

### III. CRAZINESS AND RESPONSIBILITY: A PLEA FOR SIMPLICITY

This Section begins by explaining that mental disorder rarely negates action. Then it turns to a discussion of the relation of mental disorder to rationality and claims that this relation accounts for mental health law generally and for virtually all applications of mental health laws in individual cases. Next it considers the relation of mental abnormality to so-called internal coercion or control problems. As previewed in Section II.B., the argument is that such alleged problems, even if produced by mental disorder, explain very few cases. Irrationality is the better criterion. The Section concludes with a plea for simplicity in

thinking about specific mental health law criteria.

### A. *Craziness and Action*

People with mental disorders are not automatons who act unintentionally. Their legally relevant behavior is not a reflex or unconscious. As is true for everyone, when crazy people act, they have reasons for their actions, and their wills or volitions operate effectively to translate their intentions into actions. The delusional self-defender, for example, believes she is in deadly peril, desires to live, forms the intention to kill her feared assassin, and translates that intention into killing conduct aimed at the putative assassin. For another example, a businessperson suffering from mania who is incapable of understanding the nature of the deal because she wildly overestimates her assets or totally misunderstands or ignores the risks believes the deal is a good one, desires to make money, forms the intention to make the deal, and translates this intention into action by making the deal and signing the contract. The legally relevant behavior of crazy people is intentional action, and they should be considered nonresponsible only if they lack the general capacity for rationality in that context or face a hard choice at the time.

In rare cases, mental disorder may produce altered states of consciousness that create legal unconsciousness or “automatism.” These arise primarily in the context of criminal responsibility and in most instances the law treats these situations as cases of no action, although some jurisdictions treat automatism as an affirmative defense. Again, however, these cases are rare and do not account for an appreciable share of mental health law applications, even within the criminal law.

### B. *Mental Disorder and Irrationality*

Mental disorders affect responsibility essentially because they give people crazy reasons for legally relevant conduct. In reaching this conclusion, I place myself firmly in the camp of Joel Feinberg,<sup>28</sup> Herbert Fingarette and Anne Fingarette Hasse,<sup>29</sup> and Michael Moore,<sup>30</sup> all of whom have made similar claims. Put another way, craziness can

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28. See JOEL FEINBERG, *What is So Special About Mental Illness*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 272, 272 (1971).

29. See FINGARETTE & HASSE, *supra* note 16.

30. See MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 243-45 (1984).

interfere with the capacity to grasp and be guided by good reason in a particular context, especially if the agent is grossly out of touch with reality because the agent has obviously crazy perceptions (hallucinations) or beliefs (delusions). How much craziness must interfere to negate responsibility is a normative moral, political and legal question, but such interference is why some crazy people are treated specially. At the very least, crazy reasons must motivate the legally relevant behavior to some degree, but how much the craziness must interfere with the agent's ability to grasp and be guided by good reason is precisely the normative question.

Consider those cases in which mental health laws seem to apply most unproblematically, cases in which the agent is grossly out of touch with reality concerning the legally relevant conduct. Without question, the delusional self-defender is legally insane and the delusional businessperson is incompetent to contract. For another example, suppose the delusional self-defender or businessperson has not yet acted but the threat of danger or improvidence looms. Because they nonresponsibly threaten legally relevant behavior, the law may intervene by involuntary civil commitment or by guardianship, respectively.

Discussion so far has implicitly suggested that there is a bright line, binary relation between rationality and irrationality. Although mental health laws are generally standards that do draw such an (admittedly blurry) "bright" line, in principle and in fact rationality is distributed along a continuum in the population at large and among people who suffer from mental disorders. Depending on the type and severity of disorder and its signs and symptoms, various mental disorders may affect rationality to varying degrees. If rationality is the touchstone of legal responsibility, responsibility is also distributed along a continuum and legal accountability might be adjusted accordingly. In principle, therefore, there are degrees of partial responsibility and mental health law has good reason to adopt doctrines of partial responsibility in appropriate contexts, such as criminal responsibility.<sup>31</sup>

### *C. Mental Disorder and Coercion*

A classic error concerning the relation of mental abnormality to responsibility is to assume that irrationally-motivated actions are

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31. See MORSE, *supra* note 22, at 397-402.

coerced, but simply because they are irrational they are no more coerced than rationally-motivated actions. Consider again the delusional self-defender, who kills in response to the delusionally mistaken belief that she is about to be killed. Human action to save one's life is not a mechanistic, literally irresistible cause of behavior and self-defensive action motivated by irrational beliefs is no more compelled than self-defensive behavior motivated by unreasonably mistaken or rational beliefs. The deluded agent's action is perfectly intentional—the delusional belief provides the precise reason to form the intention to kill. Moreover, the killing is also not compelled simply because the belief is pathologically-produced. A non-delusional but unreasonably mistaken self-defender, who feels the same desire to save her own life, would have no excuse for killing. There is also nothing wrong with our defender's "will," properly understood as an intentional executory state that translates desires and beliefs into action. The defender's will operated quite effectively to effectuate her desire to live when she delusionally believed that she needed to kill to survive. The real reason our delusional self-defender ought to be excused, of course, is that she is non-culpably irrational. This is the excusing condition that distinguishes her from the non-delusional but unreasonably mistaken self-defender. In most cases, then, irrationality will be sufficient to excuse a crazy agent.

Some mental abnormalities, so-called "compulsions," may seem naturally to raise the analogy of mechanism and to suggest that action is lacking or that a coercion excuse should obtain. In these cases, the analogy to mechanism is flawed, however, and the coercion theory of excuse is problematic. Compulsive states are marked by allegedly overwhelming desires or cravings. But whether the cravings are produced by faulty biology, faulty psychology, faulty environment, or some combination of the three, a desire is just a desire and satisfaction of it is human action. Even if craving is the symptom of a disease with biological roots, the cause of the desire is immaterial. Consider, for example, a person who suffers from "substance dependence disorder," or, to use the more common term, "addiction." Possessing and using the substance in question is intentional action. The addict desires either the pleasure of intoxication, the avoidance of the pain of withdrawal and inner tension, or both. The addict believes that using the substance will satisfy the desire and consequently forms the intention to possess and to use the substance. Or consider a person suffering from "pedophilia," recurrent, strong desires for sexual contact with children that produce distress or dysfunction. If the person yields and has sexual contact with a child, this, too, is surely intentional action.

An analogy is often used to attempt to demonstrate that people suffering from mentally abnormal, compulsive states are similar to

mechanisms. We are asked to imagine that a person is hanging by the fingernails from a cliff over a very deep chasm. The hapless cliffhanger is strong enough to hold on for a while, but not strong enough to save her life by pulling herself up. As time passes and gravity and muscle physiology do their work, she inevitably weakens and it becomes harder and harder to hang on. Finally it becomes impossible and the cliffhanger falls to her death. We are asked to think that the operation of compulsive desires or cravings is like the combined effect of gravity and muscle physiology. At first the hapless sufferer can resist, but inevitably she weakens and satisfies the desire for drugs, sex, or whatever.

Brief reflection demonstrates that the analogy is flawed as a putative explanation of why compulsive states are “just like” mechanisms. Unlike action to satisfy a desire, the fall is a genuine mechanism. We know that holding on indefinitely is physically impossible and that the ultimate failure of strength is not intentional. More important, imagine the following counterexample: a vicious gunslinger follows around the addict and the pedophile and threatens to kill them instantly if they touch drugs or a child. Assume that the addict and the pedophile want to live as much as the cliffhanger. Literally no pedophile or addict will yield to the desire. They simply need sufficiently good reason not to yield.<sup>32</sup> Conversely, no cliffhanger will fail to fall, despite having the best reason not to do so. Indeed, even if the same vicious gunslinger threatened to shoot the cliffhanger immediately if she started to fall, she will fall every time.

Another analogy often used to demonstrate that craving should excuse is to think of the intense cravings or desires of “compulsive” states as an “internal” gun to the head. The literal gun to the head wrongly places the victim in an unenviable hard choice situation: Do something dreadful or be killed. As we saw in Section II.B. the analogy is this: The compulsive sufferer’s fear of physical or psychological withdrawal symptoms and of other dysphoric states<sup>33</sup> is so great that it is like the “do-it-or-else” fear of death or grievous bodily injury that is necessary for a duress defense.<sup>34</sup> Yielding to the compulsive desire, the craving, is

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32. See JON ELSTER, *STRONG FEELINGS: EMOTION, ADDICTION, AND HUMAN BEHAVIOR* 135-40, 166-68 (1999) (discussing “reward sensitivity;” human action is virtually never totally “reward-insensitive”).

33. See AMERICAN PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 609 (4th ed. 1994) [hereinafter *DSM-IV*]. Essential features of “impulse-control disorders” include a build up of tension and arousal.

34. See MODEL PENAL CODE § 2.09(1) (1985).



like yielding to threat of death or grievous bodily harm.<sup>35</sup> We can not expect a person of reasonable firmness not to yield in the face of such an internally-generated hard choice, much as we cannot expect such a person not to yield in the face of an external threat of death or grievous bodily harm.

The analogy is attractive, but theoretically and practically problematic. Notice, first, that the analogy suggests no problem with the defender's will, which operates effectively to execute the intention to block or remove the dysphoria. Further, it is entirely rational to wish to terminate ghastly dysphoria, even if there are competing reasons not to, such as criminal sanctions, moral degradation or whatever. On the other hand, if the craving sufficiently interferes with the sufferer's ability to grasp and be guided by reason, then a classic irrationality problem arises and there is no need to resort to internal coercion as the ground for excuse. Indeed, as I shall suggest presently, irrationality better explains those cases of apparent internal coercion that seem to compromise responsibility.

Assume that the sufferer from internal coercion remains sufficiently rational to fail an irrationality test for nonresponsibility. Is it the case that people with compulsions act on their cravings because they fear dysphoria? Perhaps they merely really, really, really want to yield and it's unpleasant not to—who likes not getting what one really, really, really wants?—but they don't substantially fear the dysphoria. I suggest that the phenomenology of the sufferer's response to craving, unlike the phenomenology of the victim of a threat of death, is often not, and perhaps never, clear. Moreover, what if the primary motive is the pleasure or satisfaction of yielding or if such pleasure is an important, additional motive? The possibility of pleasure seems more like an offer than a threat and offers expand rather than contract freedom.<sup>36</sup> The strong desire for pleasure is not a hard choice excusing condition in law or morals.

Assuming that fear of dysphoria is a sufficient motive and that the analogy to the fear of death or grievous bodily harm is initially plausible, we have already seen in Section II.B. that the claim for an internal coercion excuse is nonetheless problematic, whatever might be its cause. Once again, if people are so fearful that they appear incapable of resisting when reasonable people would, we would tend to believe that they are morbidly fearful. In such cases, irrationality would likely be the

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35. See DSM-IV, *supra* note 33, at 609. Essential feature of "impulse-control disorders" is an experience of pleasure, satisfaction or relief after committing the impulsive act.

36. See ALAN WERTHEIMER, COERCION 204-11 (1987).

appropriate excusing claim; there would be no need to resort to problematic internal coercion.

Irrationality is a better theory for excusing some sufferers from internally coercive states. First, some compulsions, such as addictions, can sometimes produce general changes in one's lifestyle and functioning that might reduce one's general capacity to grasp and be guided by reason. Second, the effect might be more specific. The craving might be so "insistent" that it temporarily disables one's rational capacities concerning consummation. If so, an excuse for consummatory behavior might be warranted. In either case, notice that the disease concept does no independent work. It perhaps explains why the compulsive craver became irrational, but irrationality is the excusing condition. A third approach is to claim that compulsive desires are irrational, but this move is highly controversial. As we have seen, no convincing theory of the rationality of desires exists and simply terming the desire the symptom of a disease does not suggest that desires are irrational. How desires are produced is independent of whether they are rational.

#### D. *A Plea for Simplicity*

Mental health law addresses persons, intentional agents, not mechanisms. I have claimed that lack of the general capacity for rationality explains generally why some crazy people are treated specially and that such lack of rationality in a specific context, such as legal insanity, competence to contract, involuntary civil commitment, and the like, explains specific mental health law criteria. In turn, lack of rationality means that the agent has crazy reasons for legally relevant behavior, such as criminal conduct, contracting conduct, or potentially dangerous conduct. Current mental health laws often define the criteria functionally. For example, a legally insane agent does not know the nature of her conduct; an agent incompetent to contract does not understand the nature of the deal. But again, even if these functional criteria are met, the mental health law will apply only if an agent was incapable of being rational in the circumstances. Thus, crazy reasons are crucial. In contexts governed by varying doctrinal approaches in different jurisdictions, such as competence to make treatment decisions, the doctrinal differences have to do with how craziness interferes with decision making. For example, does craziness affect understanding, appreciation, or rational manipulation? Deciding which criterion should

be employed is a normative question. but ultimately, whichever test is chosen simply tells us which kind of crazy reason will do. And in every case, the legal decision maker must decide whether the evidence of crazy reasons supports the conclusion that the agent was generally incapable of rationality in the context.

My admittedly unrealistic and heuristic plea is this: All mental health laws should have the same form, asking not whether mental disorder produces or results in the legally relevant behavior, but asking instead simply whether the agent's reason for the legally relevant behavior is crazy and evidence of a general incapacity for rationality in that context. This is the core question; the rest is distraction. I contend that less confusion and more focused, rational mental health law decision making would result if this were the sole criterion for application of all laws that treat some crazy people specially because they are not sufficiently responsible.

The proposed criterion is no less precise than asking whether mental disorder produces the legally relevant behavior and asks the question far more directly. Asking whether a specific mental disorder, say, schizophrenia, causes the legally relevant behavior is in fact less precise. As DSM-IV recognizes,<sup>37</sup> all people who suffer from the same disorder are not alike and, consequently, a diagnosis, no matter how clear or severe, provides no clue to the specific reasons for action that may have operated. More important, if a specific disorder does support the application of a mental health law, it will be because the disorder produced a crazy reason that motivated the legally relevant behavior. Causation by mental disorder must be understood to mean being motivated by crazy reasons, not mechanically caused. Thus, it would be more efficient and less confusing to focus on the reason itself, rather than on the presence of disorder and causal talk that misleadingly suggest mechanism. As the next Section discusses, such a shift would produce salutary changes in clinical assessment of potential subjects of mental health law and in testimony concerning the application of mental health law in individual cases.

#### IV. ASSESSING LEGAL RESPONSIBILITY

This Section discusses the data legal decision makers need to adjudicate mental health law cases and the role of experts in assisting such adjudication.

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37. See DSM-IV, *supra* note 33, at xxii.

### A. *Determining if Reasons Are Crazy*

Section I argued that the law views the person as a practical reasoning, intentional agent. In other words, the law accepts the folk psychological explanation of human action, which explains action in terms of desires, beliefs, and intentions. Within this account, the crucial question is always, “Why did you do that?” Mental health law is no exception to this general legal view. When we can’t make sense of an agent’s legally relevant behavior, we must always ask, “Why is the agent behaving this way?” and we must always understand that the answer will be a reason, rather than a mechanistic cause. So, if a criminal defendant appears unable to understand the nature of the proceedings or to assist counsel, we need to ask why she seems to be having these difficulties. If we want to know whether we should accept a patient’s refusal to accept or to adhere to a seemingly justified medical prescription, we must ask why she does so. If we want to know whether a criminal defendant was legally insane, we must ask why she committed the crime. And in all cases, to repeat, even if the reason given is crazy or doesn’t make rational sense, we must still ask whether the agent was capable of being rational. After all, the incapacity to be rational is why some crazy people are treated specially.

To determine if a person acted both crazily and lacked the general capacity for rationality, the factfinder needs a detailed, descriptive account of the agent’s reasons for action in the context in question. These data may be obtained from family, friends, co-workers, observers, and mental health professionals. Mental health professionals may be trained, efficient observers—if they are good clinicians—but in general, all people are quite expert at gleaning other agents’ reasons for action. Without this expertise, successful human interaction would be impossible.

With the fullest possible understanding of the agent’s reasons for action in hand, it will typically be possible to decide according to the operative norm of rationality if the person acted crazily, but the question of the general capacity for rationality in the circumstances remains open. How do we know that an agent who has acted crazily is incapable of acting rationally? The standard answer is that the crazy action is the symptom of a disease and symptoms are not “voluntary.” There is some truth to this response, but it is ultimately question-begging. People with and without mental disorder are generally not responsible for thoughts, feelings, and perceptions because we do not intentionally produce them.

Yes, they are *our* thoughts, feelings, and perceptions—in the argot of therapy, we must “own” them—but they are virtually never the product of practical reason: they are simply givens of our experience. Of course, mental health law never intervenes in an agent’s life unless those thoughts, feelings, and perceptions motivate legally relevant conduct or potential conduct.

Conceding that an agent may not be responsible for motivating variables does not entail that the agent is not responsible for the conduct that they motivate. We are all subject on occasion to irrational thoughts, untoward feelings, and highly inaccurate perceptions, but we believe that most people are capable of testing those thoughts, feelings, and actions against reality before acting on them. In a word, most people are capable of getting it right, even if their psychological state predisposes them to irrational action. In contrast, we believe that mental disorder makes it more difficult to test reality. But whether the disorder makes it too difficult to hold the agent responsible for conduct requires a factual analysis of whether a particular agent was capable of refraining from crazy conduct when crazy motivating variables existed. It begs the question to assume that the agent is not responsible for the conduct that follows just because the motivating variables are symptoms.

Consider the example of drug addiction, which many claim is indisputably a “brain disease.”<sup>38</sup> Even if it is, one must distinguish between the brain changes and psychological craving feelings that persistent use produces, on the one hand, and drug seeking and using behavior, on the other. Assuming that an addict is not responsible for “addiction” and is therefore not responsible for brain changes and craving, neither of which is human action, it is still an open question whether the addict is responsible for drug-related behavior. And this question must be answered in terms of the capacity for rationality or internal coercion.<sup>39</sup> An agent may be responsible for symptomatic conduct because sufficient capacity for rationality is maintained or because the fear of withdrawal or similar dysphoric feelings does not produce a sufficiently hard choice.

There is no valid scientific or clinical test for whether an agent possesses sufficient capacity for rationality to be responsible. Deciding whether such capacity is lost is therefore a common sense inference

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38. Thomas R. Kosten, Editorial, *Addiction as a Brain Disease*, 155 AM. J. PSYCHIATRY 711 (1998); Alan I. Leshner, *Science is Revolutionizing Our View of Addiction—and What to Do About It*, 156 AM. J. PSYCHIATRY 1, 1 (1999); Alan I. Leshner, *Addiction Is a Brain Disease, and It Matters*, SCI., Oct. 3, 1997, at 45.

39. See FINGARETTE & HASSE, *supra* note 16, at 137-54, 191-95; Stephen J. Morse, *Hooked on Hype*, LAW & PHIL. (forthcoming 2000).

from data about the agent's **conduct** at the time and in the past, in both similar and different circumstances. In principle, drawing this inference is no different from drawing any other inference about general behavioral capacities, such as the capacity to produce innovative legal scholarship or the capacity to play professional golf successfully. The fullest possible behavioral data are necessary to draw the inference, often including a rich behavioral history. Again, many people can provide such primary data about the agent. Mental health professionals or other knowledgeable experts can provide general clinical or scientific knowledge, if such valid knowledge is available, about the characteristics of people similar to the agent. Ultimately, however, the final judgment must be about the specific individual who is the potential subject of special mental health law treatment.

In some cases, on policy grounds the law might not permit an agent to make a decision for crazy reasons, even if the agent seemed to retain the general capacity for rationality, because too much is at stake. Decisions concerning capital punishment might be an apt example. Suppose, an agent refused to present mitigating evidence for primarily crazy reasons. Even if the reasons did *not* indicate lack of a general capacity for rationality, the law might not permit the waiver because it simply will not let an agent "choose" death for irrational reasons. In most cases, however, sufficiently crazy reasons will indicate the lack of a general capacity for rationality—indeed, such reasons are the best evidence.

Should psychiatric or psychological diagnosis play a role in legal proceedings? I argued previously<sup>40</sup> and still believe that it should not. All DSM-IV diagnostic categories include necessary behavioral criteria, and for most, including schizophrenia and affective disorders, behavioral criteria alone are sufficient to justify the diagnosis. The question is whether a diagnosis produces value added beyond the information conveyed by the behavioral criteria that define the diagnostic category. The legal issue in mental health law cases is never whether the agent suffers from a disease; rather, it is always whether the agent has a crazy reason for legally relevant conduct. It is difficult to imagine, therefore, what additional information the diagnostic term conveys, especially because an agent may well be responsible for legally relevant conduct

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40. See Morse, *supra* note 1 at 604-15; Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 1059-70 (1982). But see Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980).



motivated by allegedly “symptomatic” crazy thoughts, feelings, and actions. Moreover, as DSM-IV recognizes,<sup>41</sup> all people whose behavior meet the criteria for the same diagnosis are not alike. Finally, relevant general information can easily be provided without using diagnostic terminology. For example, without using a diagnostic term and speaking only in terms of behavior, an expert could provide research evidence that indicates that people who have crazy thoughts similar to those of the agent under consideration also tend to behave in other, specified ways. It can be extremely difficult in some cases to determine what the agent’s reasons were, but a diagnosis will not clarify the obscure.

Although diagnoses furnish little independent information to the finder of fact, experts always use such terms in their work and why should we bar them from doing so in courts or administrative proceedings if they do no harm? I contend, however, that diagnoses do have the potential for substantial harm in mental health law adjudication because they tend to encourage the mistaken impression that the conduct of crazy people is just a mechanism, rather than action for reasons. Diagnoses tend to encourage question-begging about the foundational, nonresponsibility criterion that authorizes special mental health law treatment. Diagnoses are therefore prejudicial and misleading. In addition, there is often dispute about the appropriate diagnosis, if any, which wastes time and distracts the factfinder from the essential question of crazy reasons. For example, the Hinckley jury should not have considered whether Hinckley was suffering from schizoid or schizotypal personality disorder or schizophrenia; rather, it should have considered only whether he was out of touch with reality, and if so, to what extent. The answer to the former question can not produce an answer to the latter. To decide if Hinckley acted for crazy reasons required only analysis of his contemporaneous reasons for attempting to assassinate President Reagan, including life historical data relevant to determining what those reasons were.

Some argue that diagnosis should play an independent role in mental health law adjudication because it places objective constraints on the irrationality determination.<sup>42</sup> Without some constraint, the determination allegedly will be subject to arbitrary, relativistic criteria. The presence of diagnosable mental disorder is thus some warrant for the conclusion that there was genuine, objective impairment of the agent’s general

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41. DSM-IV, *supra* note 33, at xxii.

42. See *United States v. Moore*, 486 F.2d 1139, 1180 (D.C. Cir. 1973) (Leventhal, J., concurring). Richard Bonnie has also made this point in a personal communication to the author (February 20, 1999).

capacity for *rationality*. This argument has force, but the presence of a mental disorder has less constraining value than proponents believe. For the most part, only those agents grossly out of touch with reality will satisfy the nonresponsibility criterion and such a mental state is objectively irrational even without a diagnostic label. Cases of lesser irrationality will not qualify for special mental health law treatment, even if the behavior does warrant an official diagnosis. Finally, mental disorder diagnoses are based on subjective, socially-constructed criteria that may be manipulated for social, legal, and political purposes. In a word, psychiatric and psychological diagnoses are instinct with normativity. If our society for any reason wishes either to expand or to contract the class of people with alleged mental disorders for whom special legal treatment is appropriate, diagnostic categories will not inhibit such action. I agree with critics that the criteria for rationality that I have offered do not provide a precise, objective guide to the lack of a general capacity for rationality, but this is a problem inherent in the notion of rational practical reasoning. No such guide, including diagnosis, can substitute for careful evaluation of reasons for action.

Is a causal account of why the agent may have had crazy reasons relevant to determining the presence of such reasons? For the most part, I think not. A valid causal story will indicate that the agent is not malingering craziness, but malingering is better assessed by careful behavioral evaluation, including the use of third party information.<sup>43</sup> More important, causal explanations in psychiatry and psychology, independent of folk psychological explanation, are seldom valid, and invalid stories, no matter how persuasive they seem, cannot aid the finder of fact. If there is no question of malingering—and malingering is not an issue in most mental health law decision making—then causal accounts will not be helpful to determine whether the agent acted for crazy reasons and was generally capable of rationality. The question is always whether sufficiently crazy reasons exist, not whether we can explain why they exist. Thick description of behavior itself will be far more relevant and useful for determining the former. Moreover, causal explanations are like diagnoses: They tend to create the impression that

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43. See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 53-58 (2d ed. 1997) (expressing caution, however, about the ability to detect psychological or psychiatric malingering by any means); see generally *CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION* (Richard Rogers ed., 2d ed., 1997) (addressing clinical and research issues and data).

the agent is not responsible for the behavior caused. Again, a story about neurotransmitters, psychodynamics, social stress, or whatever may explain why an agent had crazy thoughts, feelings, or perceptions. But it will not explain whether those thoughts, feelings and perceptions motivated legally relevant conduct, and if so, whether the agent is responsible for it.

Let us consider a realistic example. Some killers convicted of capital murder waive their constitutional right to present mitigating evidence at the capital sentencing stage of the proceedings. In effect, they consent to their own execution. Provided that their waiver is voluntary, that is, rational and uncoerced, the law permits them to waive based on respect for their personhood and autonomy. Now, why would they waive the right to present undoubtedly relevant, potentially effective, mitigating evidence? Why would they consent to what is in effect state-assisted suicide? One possibility is that they feel genuinely morally guilty and believe that they deserve to die for their crimes. Assuming, as the vast majority of states do, that some capital killers *do* deserve to die, such a reason would be perfectly rational. But, to take an easy case, suppose the killer genuinely, delusionally believes that her own death will bring the victim back to life. This would clearly be a crazy reason, without regard to why the killer was delusional.

Now consider a more difficult example. Suppose after substantial evaluation of a killer who killed his own loved ones, a clinician concludes that the killer suffers from an underlying depression that has produced irrational guilt. It is a commonplace belief that losses can predispose to depression and that depression can produce irrational guilt. The question is whether this killer actually suffers from irrational guilt, a question not answered by the diagnosis of depression. Indeed, evidence of irrational guilt will indicate that depression is present, rather than the reverse. And such evidence would have to be behavioral, based on the killer's thoughts, feelings, and perceptions about *why* she wants to die and why the potential mitigating evidence does *not* demonstrate that perhaps she deserves to live. Even if such thoughts, feelings, and perceptions may have been the product of depression, it does not follow that the decision to waive the right to present mitigating evidence was based on a sufficiently crazy reason to invalidate the waiver. This decision is normative. In sum, causal explanations will add little to thick behavioral description and common sense inferences from such descriptive data about the general capacity for rationality.

## B. *Determining if Internal Coercion Obtains*

I argued in Section II that irrationality explains most cases of nonresponsibility or excuse that are ordinarily thought to raise control or volitional problems. For the purpose of argument, however, it is useful to assume that there may be a small, residual class of rational agents, uncoerced by external forces, who should be excused. Assuming, then, that internal coercion is an excusing condition, how do we assess the strength of the fear or other dysphoric psychological states that might create a sufficiently hard choice?

Consider the formulation, “unable to resist,” which has the unmistakable implication of mechanism. Unless force majeure or genuine mechanism is at work, we virtually never know whether the agent is in some sense genuinely unable or is simply unwilling to resist, and if the latter, how hard it is for the agent to resist. Based on ordinary experience and common sense, the criminal law, for example, uses threats of death or grievous bodily harms as objective indicators of the type of stimulus that would in ordinary people create sufficient hard choice to warrant an excuse. Of course, people subjected to such threats will differ markedly in their subjective responses and in their desires to live or to remain uninjured, but ordinary, average people will have very substantial desire to avoid the threatened harm.<sup>44</sup> It is true that we have all experienced dysphoric states, and many have experienced intense dysphoria, but dysphoria as a source of present and potential pain is more purely subjective than death or grievous bodily injury. Consequently, assessing the average or ordinary intensity of inner states, including seemingly strong states, is simply more difficult.

Research evidence exists concerning the characteristics that help people maintain control when faced with temptation or experiencing impulses.<sup>45</sup> But such research is no more than a general guide in the

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44. Again, the analysis could apply to moral dilemmas that the criminal law does not address. Imagine a person who possesses a monetarily worthless locket that contains an equally financially worthless but emotionally priceless memento, say, a strand of a sainted parent's hair. One could easily imagine that a threat to destroy the locket might morally excuse quite serious property crime and perhaps crimes against the person, although the criminal law would recognize no excuse in this case.

45. See ROY F. BAUMEISTER ET AL., *LOSING CONTROL: HOW AND WHY PEOPLE FAIL AT SELF-REGULATION* 242-56 (1994) (considering self-regulation techniques and distinguishing underregulation, in which the agent often actively participates, and misregulation, in which the agent seldom actively participates).

present state of knowledge. There is no metric and no instrumentation accurately to resolve questions about the strength of dysphoria or desire and the ability to resist. Indeed, the difficulty of distinguishing between an allegedly “irresistible” desire and one simply not resisted was a primary reason that both the American Psychiatric Association and the American Bar Association recommended the abolition of the control or volitional test for legal insanity in the wake of the ferment following the Hinckley verdict.<sup>46</sup> This well-placed concern generalizes to all mental health laws that treat crazy people specially because, allegedly, their disorders “compel” legally relevant behavior. If empirical, subjective “resistibility” is to be the touchstone, legal decisionmakers will simply have to act with little scientific guidance and lots of common sense.<sup>47</sup> Assessing the capacity for rationality is not an easy task, but it is a more commonsense assessment of the sort we make every day. More objective markers of internal coercion, such as physical withdrawal symptoms in the case of addictive cravings, will surely help, but they will not be dispositive.

### C. *Crazy Reasons, Internal Coercion and Prediction*

Some mental health laws require a prediction that crazy reasons or internal coercion will produce future, legally relevant behavior. Unless the motivation for future conduct is crazy, however, theoretical and legal warrant for preventive action is lacking because the nonresponsibility assumption does not apply. Risk factors unrelated to craziness, such as age, sex, and past history of similar legally relevant behavior, may

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46. Virtually all jurisdictions that enacted insanity defense changes during the reform ferment that occurred after John W. Hinckley, Jr. was found not guilty by reason of insanity for attempting to assassinate President Reagan abolished the control test. For example, by 1982 (pre-Hinckley verdict) the Model Penal Code rule had been adopted by all but one federal circuit, but in 1984 Congress adopted a narrower, purely cognitive rule, not unlike M’Naghten. After the Hinckley verdict, both the American Bar Association and the American Psychiatric Association recommended abolition of the control test of legal insanity. See AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 330, 339-42 (1984); American Psychiatric Ass’n Insanity Defense Work Group, *Statement on the Insanity Defense*, reprinted in 140 AM. J. PSYCHIATRY 681-88 (1983).

47. For example, one writer explains that “[t]he strength of the craving may be gauged by how willing the person is to sacrifice other sources of reward or well-being in life to continue engaging in the addictive behavior.” DENNIS M. DONOVAN, *Assessment of Addictive Behaviors: Implications of an Emerging Biopsychosocial Model*, in ASSESSMENT OF ADDICTIVE BEHAVIORS 3, 6 (Dennis M. Donovan & G. Alan Marlatt eds., 1988). Although written by an estimable researcher, it is no more than an operationalized, common sense measure.

increase the predictability of the legally relevant behavior, such as future violent conduct, but unless we can also predict that motivating craziness will persist, special mental health law treatment will not be justified. After all, predictability is not inconsistent with responsibility.

The predictive questions, therefore, are whether sufficiently crazy reasons will persist and whether the agent will act on them. Crazy and non-crazy people alike often have potentially motivating thoughts, feelings and perceptions that do not persist, and even if they do persist, people do not always respond with action. The proper approach to determining the relevance of crazy reasons to future legally relevant conduct is straightforward, but the data required for accurate prediction may be problematic. This decision once again requires a traditional, thick assessment of reasons for action, largely based on common-sense inferences from present and past behavior. Diagnoses will not independently answer the predictive questions about craziness or legally relevant conduct, although the behavioral data upon which they are based may be of help. Indeed, behavioral and demographic variables, especially past history, are far more likely to be valid predictors than purely clinical and psychopathological variables or diagnoses.<sup>48</sup> Valid causal explanations might in theory generate valid predictions concerning whether craziness will persist and whether legally relevant behavior will occur, but few if any such explanations are available at present.

In conclusion, crazy reasons are crucial to the predictive enterprise in mental health law because they are the guide to the foundational nonresponsibility assumption that justifies special legal treatment. Getting the prediction right is a technical problem.

## V. CONCLUSION

Crazy reasons are the royal road to understanding why mental health law exists and how individual cases should be adjudicated. Once one understands the law's view of the person and why the lack of the general capacity for rationality is the fundamental excusing condition, it follows that crazy reasons are the best evidence of this condition. Much of the scientific and clinical reasoning and technical apparatus brought to bear

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48. See James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOL. BULL. 123, 139 (1998).

on explaining and adjudicating mental health law is irrelevant and therefore unnecessary and distracting. It also tends to obscure the crucial question of responsibility. Justifying and adjudicating mental health law are normative and common sense tasks rather than scientific or clinical enterprises.